

MADISON GAS AND ELECTRIC COMPANY,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 00-56-A
ACTING MIDWEST REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	March 20, 2001

This is an appeal from a February 18, 2000, decision of the Acting Midwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), declining to provide an approval under 25 U.S.C. § 81 for a utility service agreement between Madison Gas and Electric Company (Appellant) and the Ho-Chunk Nation (Nation). For the reasons discussed below, the Board affirms the Regional Director's decision.

The agreement at issue concerns the provision of gas and electric service to the Nation's De Jope Bingo Facility, which is located on trust land in Madison, Wisconsin. The agreement was signed by Appellant's representative on September 28, 1998, and by the Nation's representative on October 29, 1998. It was approved on June 24, 1999, by the Superintendent, Great Lakes Agency, BIA. Although the approval notation does not specifically so state, other documents in the record show that approval was granted under BIA's right-of-way regulations in 25 C.F.R. Part 169.

By letter of July 20, 1999, the Nation requested that the Superintendent approve the agreement under 25 U.S.C. § 81. ^{1/} In an August 2, 1999, decision, the Superintendent

^{1/} At that time, 25 U.S.C. § 81 provided in relevant part:

"No agreement shall be made by any person with any tribe of Indians * * * for the payment or delivery of any money or other thing of value, * * * or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, * * * unless such contract or agreement be executed and approved as follows:

* * * * *

"Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

* * * * *

declined to provide such an approval, stating:

Based on our review, we have concluded that the agreement does not require our approval pursuant to 25 U.S.C. Section 81. We find there [is] no commitment of trust resources. [Appellant] will not be managing the Bingo facility or the lands themselves. The [Nation] is not forbidden from encumbering its property and the service provided by [Appellant] is not dependent upon the legal status of the [Nation]. As a result, the [Nation] has the authority to enter into the agreement without obtaining the approval of the Secretary of the Interior and the Commissioner of Indian Affairs pursuant to 25 U.S.C. Section 81.

The Nation did not appeal the Superintendent's decision. However, Appellant appealed it to the Regional Director and requested that the Regional Director approve the agreement under section 81. On February 18, 2000, the Regional Director affirmed the Superintendent's decision, stating:

The Agreement * * * was properly reviewed and filed for recording in BIA's land titles and records office as a service line agreement under 25 CFR 169.22. At the request of [Appellant] the Agency issued a formal approval letter dated June 24, 1999. * * * The review conducted by the Agency analyzed the encumbrance by [Appellant] in relation to the Indian land, compared and contrasted it with other factual situations, and properly determined that a right of way over Indian lands rather than a section 81 approval was required. We consider the Secretary's obligation to have been met with respect to the Agreement, therefore, we deny your request for section 81 approval.

Appellant then appealed to the Board.

In the appeal documents it filed with the Regional Director and in its notice of appeal to the Board, Appellant contended that, because of the uncertainty of the law concerning section 81, Appellant was in danger of having a court "declare the service agreement null and void at the instance of any person, whereupon [Appellant] would have to return all the revenue it had received." Notice of Appeal at 4.

fn. 1 (continued)

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

On March 14, 2000, before Appellant filed its opening brief in this appeal, Congress enacted legislation making substantial revisions to 25 U.S.C. § 81. See Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46. As a result of this legislation, section 81 now provides:

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

* * * * *

(e) Not later than 180 days after the date of enactment of the Indian Tribal Economic Development and Contract Encouragement Act of 2000, the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b). [2/]

In its opening brief, Appellant acknowledges the changes to section 81 but indicates that it is still concerned about the possibility that a qui tam action will be filed against it. 3/ Appellant states:

The penalties for noncompliance under the old section 81 are harsh, and therefore, [Appellant] intends to continue to seek BIA approval under old section 81 until such approval is granted or until a federal court rules that such approval is unnecessary.

In light of the new law, however, it appears that this matter could be concluded relatively quickly. The new subsection (c) appears to allow [Appellant] to rely on a BIA determination that BIA approval of the Agreement is unnecessary because the Agreement is not covered by subsection (b). The Agreement would not be covered under subsection (b) if: (1) it is held not to "encumber" Indian lands for a period of 7 or more years; and (2) new section 81 is interpreted to

2/ Proposed regulations were published on July 14, 2000. 65 Fed. Reg. 43952. Final regulations have not been published.

3/ Qui tam actions, or actions brought in the name of the United States, were authorized by section 81 prior to its revision in March 2000. See n.1, supra.

apply retroactively to contracts entered into before section 81 was amended. If this Board were to rule that new section 81 applies to the Agreement and that no BIA approval is required, the issue in this appeal becomes moot. 25 U.S.C. § 81(c) (2000).

Appellant's Opening Brief at 3.

In response, the Regional Director argues:

(1) the appellant lacks standing to challenge [BIA's] application of 25 U.S.C. § 81; (2) the service line agreements do not require approval under 25 U.S.C. § 81 but rather are governed by 25 U.S.C. § 323 and (3) the amendment to 25 U.S.C. § 81 enacted on March 14, 2000 has no retroactive effect and no impact on the issue before the Board.

Regional Director's Brief at 2.

In support of her argument on standing, the Regional Director cites Board decisions holding that a person contracting with an Indian tribe is not within the zone of interests protected by 25 U.S.C. § 81 and therefore lacks standing before the Board to argue that the tribal contract is void for lack of approval under section 81. Johnson v. Acting Phoenix Area Director, 25 IBIA 18, 25-27 (1993); Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123, 129-130 (1990). ^{4/}

This case is more closely akin to Niagara Mohawk Power Corp. v. Eastern Area Director, 32 IBIA 276 (1998), than it is to Johnson or Kombol. Niagara Mohawk was an appeal from a BIA decision declining to approve electric service agreements under section 81. Although there was no specific discussion of standing in the Board's decision, the Board impliedly recognized the appellant's standing when it decided the appeal on the merits. The Board finds that Appellant in this case likewise has standing to challenge a Regional Director's decision declining to grant approval under section 81 to Appellant's utility service agreement with the Nation.

The Regional Director cites Niagara Mohawk in support of her second argument. The Board there affirmed BIA's conclusion that the statute applicable to the agreements at issue was 25 U.S.C. § 323, concerning rights-of-way, rather than 25 U.S.C. § 81. Appellant does not show that its service agreement can be distinguished from the agreements at issue in Niagara Mohawk. The Board finds that Appellant has failed to show error in the Regional

^{4/} The appellants in Johnson sought to bolster their position in a business dispute by obtaining a holding that a contract was invalid for lack of approval under section 81.

The appellant in Kombol invoked section 81 to challenge the validity of a timber sale contract after BIA found him in breach of the contract.

Director's conclusion that BIA properly approved Appellant's agreement as a right-of-way under 25 U.S.C. § 323 and 25 C.F.R. Part 169, rather than under 25 U.S.C. § 81.

Appellant and the Regional Director disagree as to whether the revised section 81 may be applied retroactively. The Board finds it unnecessary to engage in any protracted analysis of retroactivity. Appellant states that its principal concern is that it may be subject to a qui tam action under old section 81. The qui tam provision was not carried forward into the revised section 81. Thus there is no longer any statutory authority for such suits. 5/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's February 18, 2000, decision is affirmed.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

5/ The Senate report on the legislation explained: "[B]y eliminating the qui tam provisions in the statute, the bill eliminates the possibility that third parties will bring suits without the consent of any of the parties to the agreement." S. Rep. No. 150, 106th Cong., 1st Sess. 9 (1999).